

New Beginnings and Dead Ends in the Law of Democracy

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*Courts faced with questions about the law of democracy face a series of choices that sometimes pull in opposite directions. First, courts can invoke both anti-entrenchment and anti-discrimination rationales for judicial intervention. Second, courts can articulate constitutional constraints in terms of either individual rights or structural values. Third, courts can seek to enhance electoral competition or ensure post-election representation. This essay looks at three election law cases decided by the Roberts Court—*Randall v. Sorrell*, a challenge to a Vermont campaign finance statute; *League of United Latin American Citizens v. Perry*, a challenge to Texas's mid-decade congressional redistricting; and *Purcell v. Gonzalez*, a challenge to Arizona's new voter-identification requirements—to see how the Court negotiates these considerations. In both *Sorrell* and *LULAC*, the Court seemed particularly concerned with competition and political structure. Thus, for example, *Sorrell* focused on the critical role of parties as intermediaries that enable individual voters not only to elect candidates directly but to help shape the overall composition of the legislatures. In *LULAC*, while the Court made no progress in resolving the question of how to adjudicate political gerrymandering claims, it did set out a fuller notion of representational rights in the course of deciding the plaintiffs' Voting Rights Act claims that may prove fruitful. By contrast, in *Purcell*, the Court—as it did in *Bush v. Gore*—wrapped what is best described as a structural decision in the mantle of individual rights and the iconic commitment to one-person, one-vote, and this choice left its decision unmoored from any real consideration of appropriate remedies for flaws in the law of democracy.*

Asked about the significance of the French Revolution for western civilization, Chou En-Lai is reported to have said that it was too soon to tell. When it comes to the Roberts Court and the law of democracy, the early returns are similarly provisional. Last Term, the Court decided two major cases: *Randall v. Sorrell*,¹ a challenge to a Vermont campaign finance statute; and *League of United Latin American Citizens v. Perry*,² a challenge to Texas's mid-decade congressional redistricting. The state of the doctrine is reflected in the syllabi's recital of the lineups:

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¹ 126 S. Ct. 2479 (2006).

² 126 S. Ct. 2594 (2006).

BREYER, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C.J., joined, and in which ALITO, J., joined as to all but Parts II-B-1 and II-B-2. ALITO, J., filed an opinion concurring in part and concurring in the judgment. KENNEDY, J., filed an opinion concurring in the judgment. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined. STEVENS, J., filed a dissenting opinion. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined, and in which STEVENS, J., joined as to Parts II and III.³

KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts II-A and III, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined, an opinion with respect to Parts I and IV, in which ROBERTS, C.J., and ALITO, J., joined, an opinion with respect to Parts II-B and II-C, and an opinion with respect to Part II-D, in which SOUTER and GINSBURG, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BREYER, J., joined as to Parts I and II. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, J., joined. BREYER, J., filed an opinion concurring in part and dissenting in part. ROBERTS, C.J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which ALITO, J., joined. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, in which THOMAS, J., joined, and in which ROBERTS, C.J., and ALITO, J., joined as to Part III.⁴

Nearly two hundred pages of *United States Reports* and twelve separate opinions and all one can confidently say is that Vermont's law, described by several Justices as the most restrictive campaign finance statute in the nation, violates the First Amendment; that mid-decade redistricting is not inherently suspect; and that at least one congressional district in Texas violates section 2 of the Voting Rights Act.

This level of disagreement is hardly new. In the Rehnquist Court's last major campaign finance case, *McConnell v. Federal Election Commission*,⁵ seven Justices filed nearly 300 pages of separate writings, and the "opinion of the Court" consisted of sections from three of those opinions. In its last redistricting case, *Vieth v. Jubelirer*,⁶ there was no opinion for the Court at all: four Justices would have held claims of unconstitutional political gerrymandering nonjusticiable, four Justices would have entertained such claims (although they split three ways on the applicable standard), and one Justice declined to declare such claims off the table entirely while

³ *Sorrell*, 126 S. Ct. at 2484-85.

⁴ *LULAC*, 126 S. Ct. at 2603-04.

⁵ 540 U.S. 93 (2003).

⁶ 541 U.S. 267 (2004).

simultaneously rejecting all the standards that had so far been proposed for adjudicating them.⁷ The Court is not just divided, it is splintered.

Even individual Justices sometimes seem divided. In the campaign finance cases, for example, Justices Scalia and Thomas have argued for judicial intervention precisely because incumbents can use campaign finance laws to entrench themselves and undercut their challengers.⁸ And yet, in the political gerrymandering cases—where incumbents have the lines jiggered to practically guarantee their reelection—Justices Scalia and Thomas have taken the position that courts should stay out of the fray altogether. Justice Kennedy, who has expressed his unwillingness to intervene in constitutional redistricting disputes until a manageable judicial standard is devised, recognized that the Court's experiences with the practicalities of campaign finance similarly "give[] us little basis to makes these judgments, and certainly no traditional or well-established body of law exists to offer guidance."⁹ Nonetheless, in the meantime, he was prepared to strike down Vermont's system.

But to paraphrase Leo Tolstoy, campaign finance and redistricting doctrine are each unhappy in their own way. Over the past thirty years, the Supreme Court has developed a complex First Amendment jurisprudence to deal with campaign finance law while addressing redistricting claims through a patchwork of doctrines that each deal with only a slice of the landscape. After *Sorrell* and *LULAC*, the Court seems more interventionist in the realm of campaign finance and less interventionist, at least as a constitutional matter, in redistricting. But in neither campaign finance nor redistricting has the Court's involvement achieved what John Hart Ely long ago recognized as one of the central justifications for judicial intervention: "clearing the channels of political change."¹⁰ To the contrary, our politics seems more clogged than ever, at least in part *because of* judicial interventions that have driven partisan impulses into new, and often more destructive channels—

⁷ For an extensive discussion of *Vieth*, see Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line?: Judicial Review of Political Gerrymandering*, 153 U. PA. L. REV. 541 (2004).

⁸ See, e.g., *Randall v. Sorrell*, 126 S. Ct. 2479, 2503 (2006) (Thomas, J., joined by Scalia, J., concurring in the judgment) (noting that Vermont's failure to set separate limits for primaries and general elections "will generally suppress more speech by challengers than by incumbents"); *McConnell*, 540 U.S. at 248–49 (Scalia, J., concurring in part, dissenting in part, and concurring in the judgment in part) (stating that the federal campaign finance statute "prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice," and that "any restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents" (emphasis in original)).

⁹ *Sorrell*, 126 S. Ct. at 2501 (Kennedy, J., concurring in the judgment).

¹⁰ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 74 (1980).

what Sam Issacharoff and I once identified as the “hydraulic effect.”¹¹ But although the Court has failed to articulate clear rules for adjudicating challenges to campaign finance laws or apportionment plans, the recent cases at least hint at some doctrinal movement.

In what follows, I explore the Court’s navigation of three key choices for how to frame questions about the law of democracy. First, as *Democracy and Distrust* itself reflects, there are both anti-entrenchment and antidiscrimination rationales for judicial intervention, and these can sometimes point in different directions.¹² Second, courts might articulate constitutional constraints in terms of either structural values or individual rights.¹³ Finally, courts might be concerned with enhancing electoral competition or ensuring post-election representation. While these pairings address different aspects of the law of democracy, they also can all be related to one another. At the end of the day, they are concerned not only with the reality of electoral competition and representation, but with public perception as well. And so I conclude with some brief remarks about the first election law case of this Term: *Purcell v. Gonzalez*,¹⁴ in which the Court’s per curiam opinion articulated a striking account of the competing values at stake in election disputes.

I. *RANDALL V. SORRELL* AND COMPETITION AS A FIRST AMENDMENT VALUE

The Vermont campaign-finance regime at issue in *Sorrell* (Act 64) had two distinct features. First, it imposed stringent expenditure limits on the amounts candidates for state office could spend in their campaigns.¹⁵ Second, it imposed restrictive contribution limits on the amounts that individuals and groups (including political parties) could give to candidates.¹⁶

¹¹ See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999) [hereinafter *Hydraulics*].

¹² See Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329 (2005); Kathleen Sullivan & Pamela S. Karlan, *The Elysian Fields of the Law*, 57 STAN. L. REV. 695 (2004).

¹³ This Essay is part of a larger project in which I discuss the structural-individual problem in constitutional law; see also Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1914 (2007).

¹⁴ 127 S. Ct. 5 (2006).

¹⁵ These ranged from no more than \$300,000 in the primary and general election combined for gubernatorial candidates down to no more than \$1800 for an incumbent state representative. See *Randall v. Sorrell*, 126 S. Ct. 2479, 2486 (2006) (opinion of Breyer, J.) (summarizing the expenditure limits).

¹⁶ In a two-year election cycle, an individual or a political party could contribute no more than \$400 to any one candidate for statewide office and no more than \$200 to any

The combination of expenditure and contribution limits gave the Vermont statute the same basic structure as the Federal Election Campaign Act of 1974 that had occasioned the Court's foundational decision in *Buckley v. Valeo*.¹⁷ Like *McConnell* and *Sorrell*, the *Buckley* litigation produced an intricate lineup and a lengthy set of opinions, but over the intervening thirty years the case came to stand for a few basic propositions. First, both campaign expenditures and campaign contributions involve political speech entitled to First Amendment protection. Second, preventing corruption or the appearance of corruption constitutes the primary justification for limiting these forms of political speech; by contrast, the desire to equalize citizens' voices or influence in the political process is an impermissible goal.¹⁸ Third, with respect to this anti-corruption rationale, there is a constitutionally significant distinction between expenditures on the one hand (by a candidate, a politically active individual, or a group) and contributions on the other. According to the Court, expenditure limits restrict the overall quantity of someone's speech while doing little to combat corruption; as a result, they have repeatedly been held invalid. By contrast, contribution limits impose "only a marginal restriction upon the contributor's ability to engage in free communication"¹⁹ and serve to combat both corruption and the appearance of corruption. Thus, "closely drawn"²⁰ contribution limit have survived First Amendment scrutiny.

Save for the notorious crack/powder distinction, it's hard to think of a line that has been subjected to more withering criticism over the years than *Buckley*'s expenditure/contribution distinction. As Sam Issacharoff and I have explained elsewhere, because candidates can spend essentially unlimited amounts of money, but must raise the money in relatively small packages,

the result is an unceasing preoccupation with fundraising. The effect is much like giving a starving man unlimited trips to the buffet table but only a thimble-sized spoon with which to eat: chances are great that the

one candidate for state representative. *See id.*

¹⁷ 424 U.S. 1 (1976).

¹⁸ To be sure, in later cases such as *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court adopted a definition of corruption that contained a strand of equalization, at least with respect to corporate participation. And aspects of the finance regime such as disclosure requirements may be important as much for their information-forcing effects—knowing that a candidate has the financial support of wealthy individuals or big labor or environmental groups may help voters to more accurately assess his positions—as for their anti-corruption effects.

¹⁹ *Buckley*, 424 U.S. at 20–21.

²⁰ *Id.* at 25.

constricted means to satisfy his appetite will create a singular obsession with consumption.²¹

And the pathological effects of the expenditure/contribution distinction go beyond its effects on candidates: because politically interested individuals remain free to engage in expenditures *not* consisting of contributions to candidates (e.g., so-called “independent” expenditures), a number of intermediary institutions have sprung up to receive and spend those funds; for a variety of reasons, these groups are far less publicly transparent and accountable than the candidates and formal political parties whose roles they have supplanted.²² Money plays as large a role as it ever has, and perhaps a more pernicious one.²³

One thing that *Sorrell* showed is that the expenditure/contribution distinction is now the sick man of constitutional doctrine. Only two Justices—Justice Breyer and Chief Justice Roberts—were prepared simply to endorse it.²⁴ Three Justices wanted to overrule it immediately. Justice Thomas, joined by Justice Scalia, argued once again that contribution limits should be subjected to the same heightened standard of review applied to expenditure limits.²⁵ By contrast, Justice Stevens would have toppled the *Buckley* framework in the opposite direction, applying the more deferential review now accorded contribution limits to expenditure limits as well.²⁶

In their separate opinions, the other four Justices declined to reach the issue whether *Buckley* should be overruled. But they each seemed open to the prospect in a future case. Justice Alito, who otherwise signed on to Justice Breyer’s opinion, pointedly declined to join the parts discussing the continued vitality of *Buckley*.²⁷ Justice Kennedy came quite close to the

²¹ *Hydraulics*, *supra* note 11, at 1711. *Cf. Buckley*, 424 U.S. at 19 n.18 (characterizing the limitation on expenditures as “like being free to drive an automobile as far and as often as one desires on a single tank of gasoline”).

²² *See Hydraulics*, *supra* note 11, at 1713–17.

²³ *See, e.g., Randall v. Sorrell*, 126 S.Ct. 2479, 2501 (2006) (Kennedy, J., concurring in the judgment) (“The universe of campaign finance regulation is one this Court has in part created and in part permitted by its course of decisions. That new order may cause more problems than it solves. . . . Entering to fill the void have been new entities such as political action committees, which are as much the creatures of law as of traditional forces of speech and association. Those entities can manipulate the system and attract their own elite power brokers, who operate in ways obscure to the ordinary citizen.”).

²⁴ *See id.* at 2489–91 (opinion of Breyer, J.).

²⁵ *See id.* at 2502 (Thomas, J., joined by Scalia, J., concurring in the judgment) (also citing his previous concurrences and dissents taking this position).

²⁶ *See id.* at 2506–11 (Stevens, J., dissenting).

²⁷ *See id.* at 2500–01 (Alito, J., concurring in part and concurring in the judgment).

Thomas-Scalia position. After reiterating his view both that the First Amendment “cannot tolerate” expenditure limitations and that the level of scrutiny the Court has been applying to contribution limits is “unduly lenient,” he concluded his separate concurrence by expressing “skepticism” toward the “legal universe we have ratified and helped create.”²⁸ By contrast, Justice Souter, joined by Justice Ginsburg, took an approach on the merits that approached Justice Stevens’ position. They (along with Justice Stevens, who joined this part of Justice Souter’s dissent) would have upheld Vermont’s contribution limits because those limits did not depress contributors’ speech “to the level of political inaudibility,”²⁹ surely the deferential approach of *Buckley*. At the same time, they would have permitted Vermont to defend expenditure limits as an appropriate way of “alleviat[ing] the drain on candidates’ and officials’ time caused by the endless fundraising necessary to aggregate many small contributions to meet the opportunities for ever more expensive campaigning,”³⁰ a more expansive rationale than *Buckley* itself seemed to permit.

The (at least) three-way split on the Court creates an interesting tactical dynamic. Seven Justices seem willing to reexamine *Buckley*. Six of them have indicated, with varying degrees of clarity, that they think the doctrinal frameworks for analyzing expenditure limits and contribution limits should be harmonized. But that sextet is split three-to-three, with one trio that would topple *Buckley* towards greater judicial scrutiny and one trio that would topple it towards less. To make *Buckley* fall its way, each bloc must attract at least one additional vote. While it seems quite plausible, based on the results in *Sorrell*, to assume that, if forced to choose, the Chief Justice and Justice Breyer might both choose to ratchet up the level of scrutiny for contribution limits, rather than ratcheting down the level of scrutiny for expenditure limits, it is not clear that they can be forced to make such a choice, especially given Justice Breyer’s penchant in election-related cases for fine-grained analysis.³¹ Rather than further entrench the *Buckley* distinction, then, both anti-*Buckley* camps may prefer to postpone the day of reckoning.

But while the Court may have made no progress on deciding whether or not to scrap *Buckley*, there was some doctrinal movement on a different

²⁸ *Id.* at 2501 (Kennedy, J., concurring in the judgment) (internal quotation marks omitted).

²⁹ *Sorrell*, 126 S. Ct. at 2516 (Souter, J., dissenting). On this point his dissent was also joined by Justice Stevens, thus indicating his understanding that the standard being applied was the *Buckley*-derived framework for contribution limits.

³⁰ *Id.* at 2511 (Souter, J., dissenting).

³¹ Consider here his opinion for the Court in *Easley v. Cromartie*, 532 U.S. 234 (2001), where he analyzed the contours of individual congressional districts in North Carolina to reach the conclusion that political considerations rather than racial ones predominated in the plan.

front—namely, the identification of the critical First Amendment value at play in the campaign finance cases. The primary focus of both Justice Breyer's and Justice Thomas's opinions was on how Act 64 dampened political competition—an associational and structural value—rather than how it dampened simple political speech, which might be thought of as more individual rights-focused.

In reaching that conclusion, Justice Breyer proposed a two-step framework that may itself be a doctrinal dead end. In step one, a court determines the degree of deference to accord the legislature's judgment about the level at which contribution limits should be pegged. Normally, Justice Breyer wrote, courts should defer to legislative decision about the appropriate level for contribution limits because "legislators have 'particular expertise' in matters related to the costs and nature of running for office."³² (Of course, this very familiarity is one of the reasons Justices Scalia and Thomas think courts should be especially skeptical of legislative judgments: they see a substantial risk that legislators will calibrate campaign restrictions to forestall effective competition.)³³ But when there are "danger signs" that a particular restriction creates a risk of "preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability," courts must instead exercise independent judgment and assess the "proportionality of the restrictions."³⁴ Put somewhat more conventionally, "danger signs" trigger a kind of heightened scrutiny.

Justice Breyer's ensuing independent examination of the record focused on five features of the Vermont regime that led him to conclude that it was "not closely drawn to meet its objectives."³⁵ Notably, Justice Breyer never actually specified those objectives. The most plausible account of Vermont's actual objective in enacting Act 64 involves its desire to eliminate any substantial role for money in the political life of the state. For reasons to

³² *Sorrell*, 126 S. Ct. at 2492 (opinion of Breyer, J.) (quoting *McConnell*, 540 U.S. at 137).

³³ It raises the question whether finance restrictions enacted pursuant to initiatives should be entitled to similar deference. On the one hand, the electorate lacks the expertise enjoyed by experienced politicians. On the other hand, it also lacks the incentive to entrench itself. Cf. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 503–04 (1997) (both discussing the general problem of legislative entrenchment and noting that term limits, while popular with the electorate, tend to get passed only through the initiative process).

³⁴ *Sorrell*, 126 S. Ct. at 2492 (opinion of Breyer, J.).

³⁵ *Id.* at 2495. The five features were the likelihood that the limits would restrict challengers' funds; that they applied equally to political parties and to other contributors; that they treated out-of-pocket expenditures by volunteers as contributions subject to the prescribed limits; that there was no adjustment for inflation; and that there was nothing in the record to suggest corruption or the appearance of corruption in Vermont was so significant a problem as to warrant unusually low contribution caps. See *id.* at 2495–99.

which I have already alluded, that would require controlling the demand for, as well as the supply of, money. But *Buckley*'s foreclosure of expenditure limits means that candidates' demand for money cannot constitutionally be restricted. Under those circumstances, the rationale for contribution limits must collapse back onto either anti-corruption or equalization. (Indeed, absent an expenditure limit, contribution limits actually exacerbate the time-preservation and campaign distortion problems to which Justices Stevens and Souter pointed.) Since *Buckley* also forecloses a robust version of the equalization argument, all that is left is the anti-corruption justification, which will have little traction when the limits are set at an amount below the cost of a fancy dinner for two.

Or at least it will if corruption is defined narrowly. Even the dissenters largely ignored the question whether contributions actually skew the official decisions made by elected representatives. Rather, they focused on the ways in which unconstrained spending and unconstrained fundraising undermine a particular vision of politics in which candidates spend their time interacting with the electorate in a more substantive and engaged way.³⁶ Thus, in a move reminiscent of the refinement of concepts of sexual harassment in discrimination cases, the corruption rationale has expanded beyond classic notions of *quid pro quo* corruption towards a concept of a hostile, or toxic, political environment.

Justice Breyer devoted only a cursory paragraph at the end of his discussion to the question of corruption. The bulk of his analysis was devoted not to figuring out whether Act 64 achieved its desired goal³⁷ but rather to articulating the costs it imposes on other constitutional interests. He shared the dissenters' concern with the political environment, but saw precisely the opposite danger. For him, the risk of Act 64 was that it would undermine, rather than enhance, robust political competition.

This necessarily turned Justice Breyer away from an individual, speech-based First Amendment analysis to an association-based one, treating the issue as one of political *competition*, rather than one of political *expression*.

³⁶ See *id.* at 2508–09 (Stevens, J., dissenting); *id.* at 2513–14 (Souter, J., dissenting).

Steve Teles has suggested to me that the time devoted to fundraising might undermine the legislative process in a further way. Prior to the campaign finance reforms of the 1970's, members of Congress spent more time interacting with one another face to face outside the formal legislative process, and this informal interaction may have contributed to goodwill across the political spectrum; today, however, these informal contacts are less likely to occur and thus less likely to dampen partisan conflict. Email from Steven Teles to the author (Nov. 13, 2006) (on file with author).

³⁷ Ironically, to the extent Vermont is trying to reduce the role money plays, the failure to index contribution limits to inflation—a factor Justice Breyer identifies as exacerbating Act 64's constitutional infirmity, see *Sorrell*, 126 S. Ct. at 2499, actually enhances its effectiveness, since over time the role of money would decrease.

Individuals possess three related but distinct interests in the political process: expression; vote aggregation; and governance.³⁸ Most political acts an individual undertakes involve expression. Casting a vote, even for a hopeless candidate, can be expressive in important ways, since at the very least, the right to cast a ballot reaffirms an individual's full membership in the political community. In the same way, even a political contribution of \$1, while it likely provides no tangible support to a candidate—indeed, the bookkeeping it requires may mean that, like eating celery, it consumes more resources than it produces—may be “meaningful because it represents a commitment by the contributor that is likely to become a vote for the candidate.”³⁹ But voting itself is meant to serve a more focused function than simple expression—namely, to allow a jurisdiction's constituents to elect a representative. It is precisely this more narrow function that underlies a range of Supreme Court decisions designed to channel voting into the actual determination of electoral outcomes and away from pure expression.⁴⁰ Finally, political participation extends far beyond voting: citizens care not just about the elections in which they vote directly, but also about the overall composition of the bodies on which their representatives serve, since that composition will powerfully affect whether their policy preferences will be enacted and whether their elected representative can bring home the bacon. In partisan elections, this means voters may well be as, or even more, interested in which party controls the legislature as they are in whether their preferred candidate carries their own district.

In Justice Breyer's account, Vermont's contribution limits were constitutionally defective because they interfered primarily with this final, governance, interest, and not because they prevented individual contributors from “speaking.”⁴¹ As Justice Breyer explained, not only did Act 64

³⁸ I develop this taxonomy more fully in Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705 (1993).

³⁹ *Sorell*, 126 S. Ct. at 2513–14 (Souter, J., dissenting) (describing how this view was held by a witness in the case).

⁴⁰ See *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (stating, in the course of rejecting the claim that individuals have a constitutional right to cast their ballot for a write-in candidate, that “the function of the election process is to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals, pique, or personal quarrel[s],” and that “[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently” (internal quotation marks and citations omitted)). See generally Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 330 (1993).

⁴¹ Justice Breyer did address their impact on volunteer services—which involve expressive conduct by individuals. See *Sorell*, 126 S. Ct. at 2498–99. But he treated this as “aggravat[ing] the problem” the Act posed for parties. *Id.* at 2498.

This focus was one source of Justice Thomas's disagreement with Justice Breyer, since he emphasized that “contributors, too, have a right to free speech.” *Id.* at 2505 n.3.

stringently limit the amounts individuals could contribute to candidates directly, it also applied those same limitations to political parties. Thus, the Vermont Democratic and Republican Parties, for example, could contribute no more than \$300 in any two-year electoral cycle to any candidate for state senate and no more than \$200 to any candidate for state representative.

It was because Act 64 threatened to “reduce the voice of political parties,” and not the voices of individual citizens, “to a whisper”⁴² that its limits failed constitutional scrutiny. The Act’s caps made it impossible for the parties to serve their critical intermediary function in pursuing citizens’ governance interests. Justice Breyer hypothesized, quite reasonably, that even in a small state like Vermont, many individuals will not know legislative candidates in other districts personally, but will be interested in the outcome of those out-district elections because control over the legislature turns on them. The Vermont limits foreclosed individuals from contributing effectively to the party, since the party could give only the same amount as one individual. This result was particularly troubling because parties are far more likely than individual voters to understand which legislative races are in fact competitive and therefore likely to benefit from additional investment.

In the end, while the Court’s bottom line in *Sorrell* was clear, its implications for future cases were a bit hazier. Particularly in its reliance on interjurisdictional comparisons to justify more searching judicial scrutiny and its several references to proportionality,⁴³ *Sorrell* is reminiscent of the Court’s recent punitive damages jurisprudence.⁴⁴ The problem with that jurisprudence is that except to the extent the Court simply imposes a mechanical standard—something well-nigh impossible to do with respect to contribution limits—it provides little guidance in future cases. Saying that the Missouri contribution limits at issue in *Nixon v. Shrink Missouri*

⁴² *Id.* at 2498 (opinion of Breyer, J.) (internal quotation marks omitted).

⁴³ *See, e.g., id.* at 2485 (stating that the contribution limits are unconstitutional because “they impose burdens upon First Amendment interests that (when viewed in light of the statute’s legitimate objectives) are disproportionately severe”); *id.* at 2492 (stating that once “danger signs” are observed, courts “must review the record independently and carefully with an eye toward assessing the statute’s ‘tailoring,’ that is, toward assessing the proportionality of the restrictions”).

⁴⁴ For a discussion of those cases and the Court’s somewhat ambivalent attitude about various forms of proportionality review, see Pamela S. Karlan, “*Pricking the Lines*”: *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 903–14 (2004).

This Term, Justice Breyer wrote the Court’s opinion in *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), holding that a punitive damages award of \$79.5 million violated the Due Process Clause. The Court’s approach was somewhat reminiscent of Justice Breyer’s approach in *Sorrell* in its multi-tiered, context-specific way of assessing when the risk of unconstitutional awards is present.

*Government PAC*⁴⁵ pass constitutional muster while those in Vermont do not requires a fair amount of artificially precise line-drawing and says little about which other states' regimes may now be vulnerable.⁴⁶ Long ago, Justice Cardozo wrote, with respect to due process, that:

[Courts] have said, we will not define due process of law. We will leave it to be "pricked out" by a process of inclusion and exclusion in individual cases. That was to play safely, and very likely at the beginning to play wisely. The question is how long we are to be satisfied with a series of *ad hoc* conclusions. It is all very well to go on pricking the lines, but the time must come when we shall do prudently to look them over, and see whether they make a pattern or a medley of scraps and patches.⁴⁷

Thirty years after *Buckley*, we're still at the medley stage.

The irony of the *Sorrell* majority Justices' concern with protecting political competition, and particularly with safeguarding the ability of challengers to mount effective campaigns, is that financial resources are probably a minor factor when it comes to whether at least legislative races are competitive or not. Parties and other politically sophisticated actors "target" their contributions to candidates in competitive races⁴⁸ because only a tiny handful of seats are really in play. The rest have been carefully crafted to ensure a particular outcome.⁴⁹ And precisely *because* so few seats are in play, those challengers with a realistic chance of winning may be particularly well financed by party and out-of-district contributions. Until the Court develops a jurisprudence to address the other competition-depressing features of the election system, its campaign finance decisions may serve as little more than symbolic judicial speech.

⁴⁵ 528 U.S. 377 (2000).

⁴⁶ Justice Breyer provides a list of other state contribution limits, and many of them, particularly given the size and populations of the states involved, seem rather similar to Vermont's. *See Sorrell*, 126 S. Ct. at 2493-94 (opinion of Breyer, J.).

⁴⁷ BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 96 (1928).

⁴⁸ *Sorrell*, 126 S. Ct. at 2495 (opinion of Breyer, J.).

⁴⁹ For many years, the Center for Voting and Democracy predicted the outcome of most U.S. House races long before the elections, without knowing the names of the candidates, their campaign expenditures, or anything else except the share of the presidential vote garnered in that district by each party's candidate. *See, e.g.*, Center for Voting and Democracy, *Monopoly Politics* 2004, Sept. 15, 2004, <http://www.fairvote.org/2004/> (last visited Mar. 1, 2007).

II. *LULAC v. PERRY* AND THE ARTICULATION OF REPRESENTATIONAL VALUES

In 1812, for purely partisan reasons, the Republican-dominated Massachusetts legislature redrew the state's senate districts to ensure its continued legislative control regardless of popular sentiment. The effort succeeded: although the Federalists garnered slightly more votes statewide than the Republicans, the Republicans captured 29 seats to the Federalists' 11. In honor of Governor Elbridge Gerry, who signed the bill authorizing the redistricting, the practice came to be known as gerrymandering. Perhaps the process of mid-decade partisan reworking of an otherwise entirely legitimate map should be called "delayed redistricting" in honor of then-House Majority Leader Tom DeLay, at whose prodding Texas's newly emergent Republican state legislative majority redrew the state's congressional districts in 2003 for the express purpose of "seizing between five and seven seats from Democratic incumbents."⁵⁰

As many of the Justices remarked, the Texas plan at issue in *LULAC v. Perry*⁵¹ could be understood only against a backdrop of several decades of fierce political struggle as the Democratic Party lost its traditional dominance over the state's politics to an emerging Republican majority. Following the 1990 census, Texas was required to redraw its congressional map, both to account for population movement within the state and to accommodate the three new seats it had been awarded. The Democrats still controlled the state legislature and the governorship, and they did a masterful job: managing to craft 17 Democratic seats and 13 Republican seats despite the fact that Republican candidates were sweeping statewide elections.⁵²

By the time the 2000 census figures were released, the Democrats had lost control of the governorship and the state senate. But because they still controlled the state house of representatives, they were able to block any Republican-drawn redistricting plan from going into effect. Faced with a political deadlock, a federal court drew the new plan, which added two additional seats. In the post-redistricting election of 2002, the plan produced a delegation with seventeen Democrats and fifteen Republicans, despite the fact that Republicans were now clearly the dominant party statewide. A

⁵⁰ *Session v. Perry*, 298 F. Supp. 2d 451, 472 (E.D. Tex. 2004) (internal citations omitted) (three-judge court), *aff'd in part, rev'd in part sub nom. LULAC v. Perry*, 126 S. Ct. 2594 (2006).

⁵¹ 126 S. Ct. 2594 (2006).

⁵² Texas Republicans unsuccessfully challenged the plan as an unconstitutional political gerrymander under the notoriously stringent standard of *Davis v. Bandemer*, 478 U.S. 109 (1986). See *Terrazas v. Slagle*, 821 F. Supp. 1162, 1172–75 (W.D. Tex. 1993) (three-judge court).

number of districts that voted Republican for other offices continued to elect Democratic incumbents.

The 2002 election, however, resulted in Republicans taking over control of the state house. With all the political branches now in their hands, and after an unseemly wrangle in which Democratic legislators fled the state and the Department of Homeland Security was asked to search for them,⁵³ the Republicans redrew the state's map in order to swing six seats in their direction. Among the more notorious aspects of the plan was its partition into five pieces of the district held by Martin Frost, a Democrat who had been one of the architects of the post-1990 plan; its creation of a 300-mile-long district connecting parts of Hidalgo County, on the Mexican border, with Austin in the center of the state; and its reconfiguration of the southwest Texas district held by Republican Representative Henry Bonilla, one of the few Republicans otherwise at risk of losing his seat. The Texas map was both procedurally and geographically an ugly piece of work.

If the question in *Sorrell* had been, with respect to campaign contribution limits, "how little is too little?," the question in *LULAC* with respect to political gerrymandering was "how much is too much?" That question had deeply fractured the Rehnquist Court in *Vieth*. All nine of the Justices then sitting acknowledged that excessive partisan gerrymanders raise serious constitutional questions and all nine located the constitutional infirmity at least in part in the Equal Protection Clause.⁵⁴ And yet, a majority of the Court had refused to adjudicate the plaintiffs' challenge to Pennsylvania's congressional redistricting. Justice Scalia, in a plurality opinion for himself, Chief Justice Rehnquist, and Justices O'Connor and Thomas, would have held political gerrymandering claims nonjusticiable altogether, because "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged."⁵⁵ Justice Kennedy, concurring in the judgment, was unwilling to foreclose the possibility that such standards might emerge in the future, but he explained that "[t]he lack . . . of any agreed upon model of fair and effective representation" made it difficult for courts to determine, "by the exercise of their own judgment," whether a

⁵³ See U.S. Dep't of Justice, Office of the Inspector Gen., *An Investigation of the Department of Justice's Actions in Connection with the Search for Absent Texas Legislators*, Aug. 12, 2003, <http://www.usdoj.gov/oig/special/0308a/index.htm> (last visited Mar. 1, 2007).

⁵⁴ See *Vieth v. Jubelirer*, 541 U.S. 267, 292–93 (2004) (plurality opinion) (expressing an assumption that severe partisan gerrymandering is "incompatib[le] . . . with democratic principles" and "unlawful"); *id.* at 313–14, 316 (Kennedy, J., concurring in the judgment); *id.* at 319 (Stevens, J., dissenting); *id.* at 347–52 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 365 (Breyer, J., dissenting).

⁵⁵ *Id.* at 281 (plurality opinion).

particular plan unconstitutionally “burden[s] representational rights.”⁵⁶ The four dissenting Justices all thought that the Pennsylvania plan had crossed the line, although they disagreed on how to analyze such claims.

Somewhat paradoxically, in light of its inability to adopt any governing framework in *Vieth*, the Supreme Court directed the three-judge district court in Texas, which had earlier rejected a series of constitutional and statutory challenges to the plan, to reconsider its judgment “in light of *Vieth*.”⁵⁷ *Vieth* having cast so little light, perhaps it was not surprising that the three-judge court reaffirmed its original conclusions. When the challengers once again appealed to the Supreme Court,⁵⁸ the state actually waived its right to respond to the jurisdictional statement and after considering the question at six conferences,⁵⁹ the Court noted probable jurisdiction.

While the case did produce an opinion for the Court with respect to one narrow question—whether the newly configured House District 23 violated section 2 of the Voting Rights Act because it deprived Latino voters of the ability to elect the representative of their choice—the Court made no headway whatsoever on the question whether, and if so when, claims of unconstitutional political gerrymandering are justiciable. Justices Scalia and Thomas maintained their position that all such claims are nonjusticiable.⁶⁰ The two new Justices—Chief Justice Roberts and Justice Alito—refused to take a position on the question, somewhat inexplicably writing that “the question . . . has not been argued in these cases,”⁶¹ despite the fact that various appellants proposed a series of arguments as to why this particular gerrymander failed constitutional scrutiny, all of which presupposed that very point. In light of the continued stalemate, Justice Souter, joined by Justice Ginsburg, saw “nothing to be gained by working through these

⁵⁶ *Id.* at 307 (Kennedy, J., concurring in the judgment).

⁵⁷ *Henderson v. Perry*, 125 S. Ct. 351 (2004).

⁵⁸ As a challenge to a statewide legislative redistricting, the Texas case was originally heard by a three-judge district court. See 28 U.S.C. § 2284 (2000) (requiring a three-judge court when “the constitutionality of the apportionment of congressional districts” is challenged). This meant that the case fell within the Supreme Court’s narrow appellate (as opposed to certiorari) jurisdiction. Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767 (2007).

⁵⁹ See Supreme Court of the United States, Docket 05-204, available at <http://www.supremecourtus.gov/docket/05-204.htm> (last updated Aug. 15, 2006) (detailing docket in *LULAC* case).

⁶⁰ See *LULAC v. Perry*, 126 S. Ct. 2594, 2663 (2006) (Scalia, J., joined by Thomas, J., concurring in the judgment in part and dissenting in part).

⁶¹ *Id.* at 2652 (Roberts, C.J., joined by Alito, J., concurring in part, concurring in the judgment in part, and dissenting in part).

cases.”⁶² Justice Kennedy rejected the various new standards that had been offered—many of them centering on the mid-decade nature of the redistricting⁶³—but declined to “revisit the justiciability holding” of *Vieth*⁶⁴ that such claims are potentially justiciable, under some as-yet unarticulated framework.

At the same time, in the part of his opinion for the Court that struck down House District 23, Justice Kennedy performed, under the umbrella of the Voting Rights Act, essentially the same inquiry that he had fretted could not be done in political gerrymandering cases—namely, determining whether a challenged plan impermissibly “burden[s] representational rights.”⁶⁵ *LULAC* thus illustrates one of the hallmarks of judicial review of redistricting over the past several decades: the repackaging of claims to fit the available doctrinal pigeonholes. The Court has drawn a series of distinctions between race and politics that have enabled it to strike down a number of overtly partisan gerrymanders without developing a comprehensive theory of impermissible line drawing.

At the start of the delayed redistricting, House District 23 was located primarily in southwestern Texas and contained all of Webb County, including the county seat of Laredo, a bustling border city that served as the principal port of entry for U.S. trade with Mexico and that was 94% Latino.⁶⁶ The district had been represented since the prior redistricting by a Republican, Henry Bonilla, but given burgeoning Latino voting strength, his days were numbered: even as the share of the district’s electorate that was Latino rose (reaching 55% of registered voters following the court-drawn

⁶² *Id.* at 2647 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part).

⁶³ *Id.* at 2609–10 (opinion of Kennedy, J.). By contrast, Justices Stevens and Breyer would have held the plan to be an unconstitutional gerrymander in part because the decision to redraw the lines mid-decade was prompted entirely by partisan political concerns. *See id.* at 2631–43 (Stevens, J., joined in part by Breyer, J., concurring in part and dissenting in part); *id.* at 2651–52 (Breyer, J., concurring in part and dissenting in part).

⁶⁴ *Id.* at 2607.

⁶⁵ *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment).

⁶⁶ The facts in this paragraph are taken from the brief of appellant GI Forum. Brief for Appellants GI Forum, et al. at 6, *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006) (No. 05-439), available at http://www.moritzlaw.osu.edu/electionlaw/litigation/documents/Brief_for_Appellants_GI_Forum.pdf (last visited Mar. 1, 2007).

post-2000 redistricting),⁶⁷ his share of the Latino vote had plummeted (dropping to only 8% in 2002).⁶⁸

To shore up Bonilla's prospects, the map drawers split Webb County and Laredo, which had previously been wholly contained within the district and which had provided the largest share of the district's population, moving nearly 100,000 people, the overwhelming majority of them Latino, out of the district and replacing them (in order to comply with one person, one vote) with portions of largely Anglo, Republican-leaning counties in central Texas. The result was to reduce the Latino share of the voting age population to 46%.⁶⁹

In *Thornburg v. Gingles*⁷⁰ and *Johnson v. De Grandy*,⁷¹ the Supreme Court had laid out a framework for assessing statutory racial vote dilution claims under section 2 of the Voting Rights Act. *Gingles* had identified "three threshold conditions for establishing a § 2 violation":⁷² (1) the plaintiff group must show that it is "sufficiently large and geographically compact to constitute a majority in a single-member district";⁷³ (2) it must show that it is "politically cohesive";⁷⁴ and (3) it must show that white bloc voting normally results in the defeat of its preferred candidates. *De Grandy* had required that once the preconditions were met, a reviewing court must consider the "totality of circumstances," including both a series of factors identified in the Senate Report that had accompanied the 1982 amendments to section 2 and the extent to which the number of majority-minority districts was proportional to the minority's share of the population.⁷⁵ Justice Kennedy's opinion for the Court in *LULAC* dutifully worked its way through these various threshold conditions and factors, but the animating force behind his conclusion was the way in which the redrawn lines undercut the "representational rights" of Latino voters. He emphasized that in the preceding few years, Latinos in the old District 23 "had found an efficacious political identity,"⁷⁶ and "were poised to elect their candidate of choice,"⁷⁷ having mobilized themselves in opposition to Bonilla. The reason the state removed Latinos from District 23 was precisely to undercut these voters'

⁶⁷ *Id.* at 7.

⁶⁸ *Id.* at 8.

⁶⁹ See *LULAC*, 126 S. Ct. at 2613.

⁷⁰ 478 U.S. 30, 50 (1986).

⁷¹ 512 U.S. 997, 1011–12 (1994).

⁷² *LULAC*, 126 S. Ct. at 2614.

⁷³ *Id.* (quoting *Gingles*, 478 U.S. at 50).

⁷⁴ *Id.*

⁷⁵ See *De Grandy*, 512 U.S. at 1010–12.

⁷⁶ *LULAC*, 126 S. Ct. at 2619.

⁷⁷ *Id.* at 2621.

representational interests, "protect[ing] Congressman Bonilla from a constituency that was increasingly voting against him."⁷⁸

If the justification for incumbency protection is to keep the constituency intact so the officeholder is accountable for promises made or broken, then the protection seems to accord with concern for the voters. If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters.⁷⁹

The same concern with the newfound concept of "representational rights" may also have informed Justice Kennedy's explanation of why the newly created District 25—a majority-Latino district that stretched from McAllen and Hidalgo County on the Mexican border to Austin in the center of the state, and which the district court and Chief Justice Roberts colorfully called a "bacon-strip district"⁸⁰—could not compensate for the destruction of District 23. According to Justice Kennedy, the yoking together of "distant, disparate communities," even if they shared an ethnicity, would make it more difficult for candidates "to provide adequate and responsive representation once elected."⁸¹

The interesting question regarding political gerrymandering is why Justice Kennedy was unwilling to extend his analysis of representational rights beyond Latinos in District 23 to encompass Democratic voters in other parts of the state. To be sure, the Voting Rights Act reflects a congressional judgment that the law should provide enhanced protection for the representational rights⁸² of racial and language minorities. Particularly given the courts' reluctance to develop a robust political theory of representation, there may be especially good reasons for courts to implement congressional judgments regarding minority political power.⁸³ But the nature of the representational injury suffered by residents of the former District 23 did not depend entirely on their being a language minority.

LULAC marks the first time that Justice Kennedy, who had expressed skepticism about the constitutionality of the Voting Rights Act,⁸⁴ found a violation of section 2. Perhaps he was influenced by the evidence that racial

⁷⁸ *Id.* at 2622.

⁷⁹ *Id.* at 2622–23.

⁸⁰ *Id.* at 2655 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁸¹ *Id.* at 2619.

⁸² Or as section 2 phrases it, the "opportunity . . . to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (2000).

⁸³ See Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. (forthcoming 2007).

⁸⁴ See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting).

polarization remains pervasive in Texas politics. That “the State took away the Latinos’ opportunity [to elect a candidate in District 23] because Latinos were about to exercise it,” he observed, “bears the mark of intentional discrimination that could give rise to an equal protection violation.”⁸⁵ But precisely because politics will almost *always* be a better explanation of the motivation behind district lines drawn by politicians,⁸⁶ the Equal Protection Clause alone cannot protect minority voters.⁸⁷ Thus, if Justice Kennedy wants to protect voters like the Latinos of Laredo, and he does, section 2 of the Voting Rights Act provides the best doctrinal handle.

The intersection of political and racial concerns in redistricting had vexed the Court throughout the 1990’s, producing the somewhat incoherent *Shaw* doctrine: if plaintiffs could show that race was the predominant motivation for a district’s boundaries, the defendant jurisdiction was required to show that its use of race was narrowly tailored to further a compelling state interest.⁸⁸ Throughout the *Shaw* cases, Justices Scalia and Thomas had repeatedly suggested that there was no justification for taking race into account.

But in *LULAC*, they seemed to switch gears. Justice Scalia’s opinion on this point, joined by the Chief Justice and Justice Alito, as well as Justice Thomas, declined to trigger strict scrutiny with respect to District 23: the desire to protect Bonilla showed that the primary purpose for that district’s configuration was political.⁸⁹ That tack was unavailable with respect to the configuration of the new “bacon strip” district, District 25. That district could be explained only with reference to its racial composition: the state purposefully created this new majority-Latino seat in order to obtain preclearance of the redistricting plan. Thus, Justice Scalia concluded, District 25 could be upheld only if it survived strict scrutiny.⁹⁰

⁸⁵ *LULAC*, 126 S. Ct. at 2622.

⁸⁶ See Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 302 (1996).

⁸⁷ This point ultimately doomed any robust version of the Court’s *Shaw* jurisprudence. See *Easley v. Cromartie*, 532 U.S. 234, 253–54 (2001) (finding that even the desire to protect a minority incumbent elected originally from a district held invalid under *Shaw* was primarily political and thus did not trigger strict scrutiny of his new district).

⁸⁸ For an extensive discussion of the *Shaw* doctrine and a bibliography of the voluminous literature it spawned, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 904–07 (rev. 2d ed. 2002).

⁸⁹ See *LULAC*, 126 S. Ct. at 2666 (Scalia, J., concurring in the judgment in part and dissenting in part).

⁹⁰ *Id.* at 2667.

Justices Scalia and Thomas had never before found an interest that satisfied strict scrutiny.⁹¹ And they had expressed doubt about the constitutionality of the Voting Rights Act, at least insofar as it prohibited state actions that were not themselves unconstitutional.⁹² But in *LULAC*, they would have upheld District 25 because it served the compelling state interest in complying with section 5's nonretrogression requirement:

We have in the past left undecided whether compliance with federal antidiscrimination laws can be a compelling state interest. I would hold that compliance with § 5 of the Voting Rights Act can be such an interest. We long ago upheld the constitutionality of § 5 as a proper exercise of Congress's authority under § 2 of the Fifteenth Amendment to enforce that Amendment's prohibition on the denial or abridgment of the right to vote. If compliance with § 5 were not a compelling state interest, then a State could be placed in the impossible position of having to choose between compliance with § 5 and compliance with the Equal Protection Clause. Moreover, the compelling nature of the State's interest in § 5 compliance is supported by our recognition in previous cases that race may be used where necessary to remedy identified past discrimination. Congress enacted § 5 for just that purpose, and that provision applies only to jurisdictions with a history of official discrimination [such as Texas].⁹³

It remains to be seen whether, having treated section 5 as a justification for the creation of District 23, these four Justices will uphold the renewed and amended section 5 when its constitutionality comes before the Court sometime in the next few years.⁹⁴ Cynics might observe that the first district

⁹¹ In *Johnson v. California*, 125 S. Ct. 1141 (2005), a case involving temporary racial segregation within California's state prisons, they would not have applied strict scrutiny in the first place and, given a more deferential standard of review, they would have upheld the department of corrections' policy. See *id.* at 538-42 (Thomas, J., dissenting).

⁹² See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

⁹³ *LULAC*, 126 S. Ct. at 2667 (Scalia, J., concurring in the judgment in part and dissenting in part) (citations omitted).

⁹⁴ In 2006, Congress extended and amended the preclearance regime, keeping Texas and other covered jurisdictions within its strictures for another twenty-five years. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 4, 120 Stat. 577 (codified at 42 U.S.C. § 1973b). The extension has been challenged by a Texas municipal utility district. See *Nw. Austin Mun. Util. Dist. No. 1 v. Gonzales*, (pending before a three-judge court in the D.D.C.) (on file with author). For discussions of the constitutional issues involved, see for example, Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177 (2005); Karlan, *supra* note 83; Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth*

to survive strict scrutiny was one drawn as part of a Republican gerrymander; the earlier districts that had been struck down as insufficiently compelling were all contained within plans drawn by Democrats. But if the Voting Rights Act provided a compelling basis for Texas to take race into account in drawing congressional districts in 2003, it is hard to see how section 5 should lose its *raison d'être* immediately.

LULAC also marked Chief Justice Roberts' and Justice Alito's first forays into the political thicket of redistricting. The most striking line of the Chief Justice's separate opinion (joined by Justice Alito), which would have upheld the Texas plan in all respects, came in his dissent from the Court's decision to strike down District 23. He criticized the majority for finding vote dilution at all, given the fact that the new plan contained as many majority-Latino districts as the old one with the addition of the "bacon strip" District 25 and observed that "[i]t is a sordid business, this divvying us up by race."⁹⁵ Of course, the Chief Justice could have stopped the sentence after the word "up," and it would have been just as true. Moreover, although his opinion at least implies that the sordid divvying is somehow the product of the Voting Rights Act, with which Texas attempted to comply by creating the "bacon strip" District 25 to replace the prior majority-Latino District 23, the initial use of race was entirely independent of Voting Rights Act imperatives: it consisted of the state's partisan-motivated decision to remove Latinos from Bonilla's district to shore up his prospects for reelection.

Ultimately, *LULAC* shows both how hard it is to disentangle the various strands of the Court's redistricting jurisprudence, and how elastic that jurisprudence has become both in providing Justices inclined to strike down a plan with the means of doing so and Justices inclined to uphold a plan with countervailing arguments. It also shows the continuing vitality of the porous race/party line: the Court is willing to intervene to protect a group of voters who are defined by their ethnic affiliation even as it remains unwilling or unable to protect groups that it sees in political terms instead.

III. *PURCELL V. GONZALEZ* AND THE REVIVAL OF THE INDIVIDUALIST ACCOUNT

Just to show how tentative any doctrinal advances from the Roberts Court might be, consider the Court's one unanimous decision in the electoral arena: its decision earlier this Term in *Purcell v. Gonzales*,⁹⁶ to permit

Amendments in the Rehnquist and Waite Courts, 101 MICH. L. REV. 2341, 2361–74 (2003); Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote* 20 (2006), available at <http://ssrn.com/abstract=900161>.

⁹⁵ *LULAC*, 126 S. Ct. at 2663 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁹⁶ 127 S. Ct. 5 (2006).

Arizona's new voter identification requirements to go into effect for the 2006 election. In contrast to *Sorrell*, where Justice Breyer's opinion shifted away from individual and toward structural accounts, *Purcell* took a concern that—if it were valid at all—almost certainly sounds in structural terms and shifted it toward an individual account.

In 2004, Arizona adopted new and draconian voter identification requirements that required individuals both to present specified documentary proof of citizenship in order to register and to present certain forms of government-issued identification in order to cast a ballot on election day.⁹⁷ Despite the likely disparate impact of the new identification provisions on minority voters (not to mention on poor, elderly, and disabled citizens more generally), the provisions were precleared by the Department of Justice in 2005.⁹⁸ A number of individuals, organizations, and Indian tribes then brought suit, challenging the requirements on constitutional and statutory grounds.

Faced with an impending election, the district court denied the plaintiffs' request for a preliminary injunction, issuing its findings of fact and conclusions of law only a month later. In the interim, the plaintiffs appealed and a two-judge motions panel of the Ninth Circuit issued a four-sentence order enjoining enforcement of the identification requirements pending full briefing and disposition of the appeal from the district court's denial of a preliminary injunction.

The Supreme Court unanimously vacated the court of appeals' order, allowing the identification requirements to be used in the 2006 election. The narrow basis for the Supreme Court's ruling was the court of appeals' failure "to give deference to the discretion of the District Court."⁹⁹ Thus, the Court emphasized that it "express[ed] no opinion here on the correct disposition, after full briefing and argument, of the appeals from the District Court's September 11 order or on the ultimate resolution of these cases."¹⁰⁰

⁹⁷ See ARIZ. REV. STAT ANN. § 16-166 (2006); *id.* § 16-579. Last year, in Maricopa County (Arizona's most populous county), seventeen percent of registration applications were rejected for failure to provide proper documentation, despite officials' confidence that most of the applications were from eligible citizens. See Dennis Welch, *ID Law Blocking Legal Votes: County Officials Reject 1 of 6 Registration Requests Due to Prop.* 200, E. VALLEY TRIB., Aug. 16, 2006.

⁹⁸ See *Purcell*, 127 S. Ct. at 6. The Department of Justice has declined to object to several recent voter identification requirements, including one later enjoined as an unconstitutional poll tax and an impermissible burden on the right to vote by both federal and state courts in Georgia. See *Common Cause v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006).

⁹⁹ *Purcell*, 127 S. Ct. at 7.

¹⁰⁰ *Id.* at 8.

And yet, in its framing of the context, the Court offered a singular account of the interests at play. On the one hand, the plaintiffs had a "strong interest in exercising the 'fundamental political right' to vote."¹⁰¹ The "possibility" that qualified voters might be precluded from voting by a lack of adequate identification should, the Court observed, "caution any . . . judge to give careful consideration to the plaintiffs' challenges."¹⁰²

On the other side, the Court began by noting the state's "indisputably . . . compelling interest in preserving the integrity of its election process."¹⁰³ That might have seemed like a structural concern, but the Court's opinion almost immediately switched into the language of individual rights:

Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).¹⁰⁴

The Court's rhetorical move is strongly reminiscent of its approach in *Bush v. Gore*,¹⁰⁵ where it also wrapped what was a structural decision in the mantle of individual rights, and the iconic commitment to one-person, one-vote.¹⁰⁶ The Court's equation of state denial of the right to vote with voters' *private* decisions not to participate in a process in which they lack confidence represents a breathtaking expansion of the concept of vote dilution. By treating the case as involving a tradeoff between the rights of two classes of individual voters, the Court has subtly shifted the terms of future analysis from one that focuses on whether particular restrictive practices can be justified to one that presupposes that some level of vote denial or dilution is inherent in the system and the only question is which group of voters should be excluded. The individualist turn in the Court's language stands in sharp contrast to its far more structural and competition-oriented analyses in *Sorrell* and *LULAC*. And it places a potential roadblock in the way of the

¹⁰¹ *Id.* at 7 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (internal quotation marks omitted)).

¹⁰² *Id.*

¹⁰³ *Id.* (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)).

¹⁰⁴ *Id.*

¹⁰⁵ 531 U.S. 98 (2000).

¹⁰⁶ See PAMELA S. KARLAN, *EQUAL PROTECTION: BUSH V. GORE AND THE MAKING OF A PRECEDENT IN THE UNFINISHED ELECTION OF 2000* 159 (Jack N. Rakove ed., 2001).

concerted political action that it celebrated and sought to protect in both those cases.

IV. CONCLUSION

The Supreme Court was onto something in both *Sorrell* and *LULAC*: the political process, as it operates today, falls far short of the ideals of robust debate of issues followed by elections that reflect the popular will and ensure democratic accountability. But the Court remains deeply divided over what, if anything, can be done to solve those problems, either by the political branches or by the judiciary. Sixty years after Justice Frankfurter warned his colleagues “not to enter this political thicket,”¹⁰⁷ the Court is embroiled in the thicket more than ever. Part of the reasons for the current inconsistency in the doctrine are the very real tensions that any jurisprudence of politics must navigate: among stability, robust competition, and protection of minority groups; between protecting individual rights and promoting institutional arrangements that fairly reflect group interests; and between anti-entrenchment and anti-discrimination models of judicial intervention. As long as money and race remain salient in American politics—and it’s hard to imagine either fading away any time soon—judicial intervention will remain both necessary, and necessarily dicey.

¹⁰⁷ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).